Inclination to Self-Preservation and Rights to Life and Body in þÿ S a m u e l P u f e n d o r f s N a t u r a l L a w T h e o r y

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Inclination to Self-Preservation and Rights to Life and Body in Samuel Pufendorf's Natural Law Theory

Heikki Haara

Introduction

Today Samuel Pufendorf's theory of natural rights is sometimes considered a precursor of the modern concept of human rights.[1] These modern concerns may, however, obscure the fact that he did not emphasize individual rights as the best way to organize society. Pufendorf's main practical concern was to offer a theory that would explain and justify why individuals should obey sovereign state authority in order to maintain sociability and political stability. Though he attributed certain universal natural rights to all individuals, Pufendorf, like Protestant natural law theorists, conceptualized natural rights as subordinate to the duties imposed by natural law and, therefore, politically defeasible.[2]

Numerous scholars have contributed to our understanding of the moral theoretical foundations of Pufendorf's theory of natural rights.[3] However, relatively little attention has been paid to the moral psychological aspects of Pufendorf's rights thinking.[4] This article focuses on two

[1] See, for instance, Carl Wellman, *The Moral Dimensions of Human Rights* (Oxford: 2011), 197; Micheline R. Ishay. *The History of Human Rights: From Ancient Times to Globalization* (Berkeley: 2004), 7-8.
[2] Knud Haakonssen, "The Moral Conservatism of Natural Rights," in *Natural Law and Civil Sovereignty. Moral Right and State Authority in Early Modern Political Thought*, eds. Ian Hunter and David Saunders (London: 2002), 27-42.
[3] See especially Kari Saastamoinen, "Liberty and Natural Rights in Pufendorf's Natural Law Theory," in *Transformations in Medieval and Early-Modern Rights Discourse*, eds. Virpi Mäkinen and Petter Korkman (Dordrecht: 2006), 225-256; Thomas Mautner, "Pufendorf and the Correlativity Theory of Rights," in *Grotius, Pufendorf and Modern Natural Law*, ed. Knud Haakonssen (Dartmouth: 1999), 159-182; Thomas Behme, *Samuel von Pufendorf. Naturrecht und Staat: Eine Analyse und Interpretation seiner Theorie, ihrer Grundlagen und Probleme* (Göttingen: 1995), 80-86.
[4] This article is based on the chapter 5 of the book *Pufendorf's Theory of Sociability: Passions, Habits and Social Order* (Cham: 2018), 137-164. For Pufendorf's moral psychology, see also Thomas Pink, "Natural Law and the Theory of Moral Obligation," in *Psychology and Philosophy: Inquiries into the Soul from Late Scholasticism to Contemporary Thought*, eds. Sara Heinämaa and Martina Reuter (Dordrecht: 2009), 97-114; Hannah Dawson, "Pufendorf and Locke on the Edge of Freedom and Reason," in *Freedom and the Construction of Europe*, eds. Quentin Skinner and Martin van Gelderen

natural rights which he is concerned with in his main work *De jure naturae et gentium* (1672) and its abridged textbook version *De officio hominis et civis* (1673): the natural rights to life and body.[5] I will illustrate how Pufendorf conceptualized these rights from the perspective of the inclination of self-preservation.[6] Pufendorf's remarks concerning the inclination of self-preservation serve different purposes, depending on their particular textual context. Rather than criticizing Pufendorf for the irregularity of his arguments, my purpose is to draw attention to the inherent complexity of his thinking on rights.

In what follows, I shall scrutinize the passages in which Pufendorf refers to the inclination of self-preservation. I will show, in the first section, that the natural duty and right of self-preservation are not grounded on the natural inclination of self-preservation but on the divinely imposed law of sociability. Pufendorf is at pains to underline that the duty and correlative right of self-preservation are not grounded in the natural features of humanity. Nevertheless, the inclination of self-preservation works in the same direction with the commands of natural law. God has implanted this inclination into human nature in order to help people to accomplish the duties imposed by natural law. Section two shows that, despite his sharp distinction between morality and nature, Pufendorf's thinking about nature and the limits of rights is not detached from his analysis of the coercive effects of self-preservation. When specifying the content and limits of natural rights, that is, a moral power to act that natural law grants or leaves unaffected, he takes into consideration the fact that people involuntarily strive towards self-preservation. However, the inclination of self-preservation cannot justify the actions that might seriously affect the stability of the state. Finally, in section three, I will examine Pufendorf's theory of necessity, where his attentiveness to the inclination of self-preservation has significant moral and political implications. Most notably, when the instinct of self-preservation necessitates the will, individuals cannot be regarded as entirely voluntary agents, and their moral power (*potestas*) to do something that natural law leaves unaffected

(Cambridge, UK: 2013), 115-133; Ben Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities* (Cambridge, Eng.: 2017), 63-103.

[5] The standard scholarly editions of these works are Pufendorf, Samuel, *De jure naturae et gentium*, ed. Frank Böhling (*Samuel Pufendorf Gesammelte Werke*, Band. 4) (Berlin: 1998) and Pufendorf, Samuel, *De officio*, ed. Gerhard Hartung (*Samuel Pufendorf Gesammelte Werke*, Band 2) (Berlin: 1997). English translations of *De jure* are chiefly from Samuel Pufendorf, *The Political Writings of Samuel Pufendorf*, ed. Craig L. Carr, trans. Michael J. Seidler (New York: 1994) and in the passages omitted by Seidler from Pufendorf, Samuel, *Of the Law of Nature and Nations*, trans. Charles Henry Oldfather and William Abbot Oldfather (Oxford: 1934). I have sometimes slightly altered Oldfathers' translation in order to make the translation more precise and acute. Alterations are indicated in the footnote. English translations of *De officio* are from Samuel Pufendorf, *On The Duty of Man and Citizen according to Natural Law*, ed. James Tully and trans. Michael Silverthorne (Cambridge, Eng.: 1991). References to these works are specified by book, chapter and section.

[6] Pufendorf sometimes uses the term *inclinatio* and at other times the term *instinctus*. There is no significant difference between his usages of these terms, and therefore I will use the English equivalents "inclination" and "instinct" interchangeably.

achieves important significance.

Duty and Right to Stay Alive

In Pufendorf's natural law theory, natural duties and rights are attached to the world by God's legislative act. When creating human beings as creatures that necessarily need a peaceful social life, God conjointly imposed a basic normative dimension on the world that human beings can demonstrate by reason. Pufendorf articulates and demonstrates all moral norms and institutions with reference to the fundamental obligation to cultivate sociability. Prior to human agreements or civil legislation, nature (ultimately God) has granted us certain rights, "such as life, body, limbs, chastity, simple esteem, and freedom".[7] Characteristically, these natural rights are a derivative from the duties imposed by the law of sociability.[8] The duty to take care of my body and to stay alive is a required means to live up to one's personal obligation to the end of the law of nature: the cultivation of peaceable sociability. The duty to promote sociability involves cultivating sociable relations with others and acting as a useful member of society. Because an individual needs his body and life to fulfill the duties of sociability imposed by natural law, other people are obligated not to use his body or kill him without his consent.

Pufendorf's theory of natural rights has been viewed through slightly different lenses among modern scholars. Knud Haakonssen has suggested that natural rights are predominantly founded on the obligations that natural law imposes on us rather than on the obligations that other people have towards us.[9] For that reason, our duty and correlative right to take care of our bodies and stay alive is a means to fulfill our obligations imposed by natural law. According to a somewhat different interpretation, natural rights are predominantly founded on the obligations that other people have towards the right holder. Richard Tuck, for instance, claims that individuals may only have rights in "the network of social obligations."[10] In turn, Kari Saastamoinen has argued that there are actually two foundations for natural rights, noting that the natural rights to life and body are corollaries of the duties imposed by natural law, whereas the natural right of self-governance is

[7] *De jure* 3.1.1. Translation in Pufendorf, *The Political Writings*, 158.

[8] In his early work, *Elementorum*, Pufendorf divided the fundamental law of nature into two parts: the individual should "protect his own life and limbs as far as he can" and "not to disturb human society." Samuel Pufendorf, *Two Books of the Elements of Universal Jurispudence*, ed. Thomas Behme and trans. William Abbot Oldfather (Indianapolis, Ind.: 2009), 327. Pufendorf modified this earlier formulation in *De jure* and placed the duty and right to protect one's life and body under the general duty of sociability.

[9] Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to Scottish Enlightenment* (Cambridge, Eng.: 1998), 40-41.

[10] Richard Tuck. *Natural Law Theories: Their Origin and Development* (Cambridge, Mass.: 1979), 160-161.

founded on other people's obligation to regard rights holders as their natural equals.[11]

I agree with Haakonssen and Saastamoinen that when Pufendorf is speaking of normal adults (which obviously he is mainly doing) the natural rights to life and body are corollaries to the duties imposed by natural law. It should be noted, however, that rights are corollaries of duties only for those individuals who are reasonable enough. When a small child (or an insane adult)[12] is not capable of governing his or her own actions by reason, the rights to life and body are predominantly founded on the obligations of other people towards the right holder. Pufendorf explains that "obligations require for their fulfilment an awareness of one's self and what one does, they do not become effective until a person knows how to direct his actions according to some norm and to distinguish them from one another". In turn, rights belong to an individual as soon as he or she is born and "can benefit even those who are unaware of what is happening".[13] This suggests that a right holder may have rights to his life and body even when he or she is too young to be able to understand his personal obligations imposed by natural law. Natural rights become effective as soon as a person is born.[14] Thus, while Pufendorf regards the natural rights of adults as a derivative of duties, in the case of small children, rights create obligations rather than vice versa.

Given Pufendorf's renowned distinction between moral entities (*entia moralia*) and physical entities (*entia physica*), natural rights cannot be directly deduced from the natural features of humanity.[15] The inclination of self-preservation as a physical entity is morally indifferent without relating it to the law of sociability that ought to always guide our actions irrespective of whatever inclinations we may naturally have. By separating morality and nature into two conceptually distinct domains, Pufendorf is confronting a distinctive problem: how to integrate a morally indifferent natural inclination which involuntarily predisposes individuals to preserve their lives into the divinely imposed requirement of sociability?

He attempts to tackle this difficulty by explaining what kinds of duties we have towards ourselves. Accordingly, "everyone knows how much a man loves his own life, how self-preservation lies upon his heart". Therefore, the question "whether that natural instinct (*naturalis*

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[11] Saastamoinen, "Liberty and Natural Rights," 241-248.

[12] Pufendorf considers people who suffer from mental disorders to be outside the scope of his discussion of rights. *De jure* 2.2.3.

[13] *De jure* 1.1.7. Translation in Pufendorf, *The Political Writings,* 102.

[14] The life of an infant is guarded by the natural law. *De jure* 6.1.3. If anyone "destroys or aborts the content of a mother's womb", he does not injure "an unformed object", but "sins against the law of nature by cutting off a member of human society" and against the parents and the state "by depriving them respectively of a hoped-for citizen and offspring". *De jure* 1.1.7. Translation in Pufendorf, *The Political Writings*, 102. Paternal power does not extend so far that a family's father can commit an abortion. *De jure* 6.2.6.

[15] *De jure* 1.1.3–4.

instinctus), which he has in common with brutes impels" the human being to stay alive in himself, "or whether, as a matter of fact, there is in addition some command of natural law" is not self-evidently answered.[16] The reason for this difficulty is that the instinct of self-preservation seems to incline humans to stay alive without any additional command. People could not easily act otherwise than as the instinct of self-preservation drives them.[17]

Pufendorf argues that the duty and correlative right to self-preservation cannot be deduced from the mere instinct of self-preservation common to all animal creatures because, if humans' relation to God is removed, "it appears that a man is obligated only through sensitive instinct, and since this does not have the force of law, whatever is opposed to it should not be accounted as a sin".[18] Moral obligations always presuppose a higher authority having both the legitimate reason to impose some obligation and the capacity to punish a wrongdoer.[19] Thus, a person cannot obligate himself; because "no matter how much he intends to obligate himself it is nonetheless in vain, since he can always free himself at his own pleasure without having done anything".[20]

Pufendorf clarifies that "if a man were born only for himself', he would have been able to freely choose what to do to his body and life. However, self-preservation should be understood as a moral duty owed ultimately to God, because "the social relation, for which man was created, cannot be exercised and preserved to good advantage unless every man improves and preserves himself to the best of his ability". Therefore, if an individual fails to care for himself, "he works an injury, not, indeed, on himself but on God, his Creator, and on the human race".[21] People are obligated by the law of nature to preserve their lives, because God has commanded them to cultivate human society. Thus, we ought to stay alive independently of any directive desire.

Nevertheless, the instinct of self-preservation arising from our nature is not an enemy of reason. On the contrary, the inclination to self-preservation and "the dictates of right reason" are closely connected: they often point us in the same direction. God has implanted in human nature an instinct for self-preservation as "an aid to the dictates of reason". Since the human condition and social life are often so unpleasant and miserable, Pufendorf asks rhetorically: "who would not, at the first opportunity, take his own life, did not his instinct so forcefully commend it, or were not death accompanied by ideas of such bitterness?"[22] It is representative, for Pufendorf,

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[16] *De jure* 2.4.16. Translation in Pufendorf, *Of the Law of Nature and Nations*, 256.
[17] *De jure* 2.4.16
[18] *De jure* 2.6.19. Translation in Pufendorf, *Of the Law of Nature and Nations*, 261. See also *De jure* 1.6.7.
[19] *De jure* 1.6.9.
[20] *De jure* 1.6.7. Translation in Pufendorf, *The Political Writings*, 122.
[21] *De jure* 2.4.16. Translation in Pufendorf, *Of the Law of Nature and Nations*, 256.
[22] *De jure* 2.4.16. Translation in Pufendorf, *Of the Law of Nature and Nations*, 256–257. Later on in *De statu*, Pufendorf

to refer to the idea that God has implanted in humans some emotional inclinations in order to help them to promote sociability.[23] The fulfillment of certain other-regarding duties of sociability would also be too difficult if people were aided only by their understanding and will. Without the decrees of natural law, however, the instinct of self-preservation in itself absences moral value, even it often almost inseparably predisposes us towards the end of natural law, the survival of the human race as whole.

Coercive Effects of the Inclination of Self-Preservation

The previous section showed that while Pufendorf acknowledges that right reason and the inclination of self-preservation often recommend the same kind of actions, he simultaneously endeavors to draw a conceptual distinction between the natural instinct of self-preservation and the obligation to cultivate sociability. All the same, in some contexts, when explaining the scope of the right of self-preservation as a sphere of legitimate actions, it appears that Pufendorf makes normative claims based on the inclination to self-preservation. This is most clearly exemplified in his treatment of the right to self-defense.

The right to protect one's life body by violent means is ultimately justified by the good of society. Without it, honest citizens would be at the mercy of the wicked, and for that reason, "to forbid the use of force in self-defence, so far from conducing to peace, would mean the end of mankind."[24] In a case of inescapable danger people have a right to self-defence in the state of nature as well as in civil state.[25] However, when explicating the specific content of the right of self-defence, Pufendorf links the natural inclinations of human nature to natural rights by stating that "my care (*cura*) for my own gives me the power (*potestas*) to maintain and defend myself and mine by any means at my disposal, even to the injury of my assailant." He continues that "nature

makes a similar kind of distinction between the inclination of self-preservation and right reason, explaining that many human actions are dedicated to self-preservation "which is recommended both by reason and by nearly inseparable passion through which they are keen to acquire advantages for and ward off injuries from themselves." Samuel Pufendorf, *Samuel Pufendorf's On the Natural State of Men.* The 1678 Latin Edition and English Translation, trans. Michael Seidler (Lewiston: 1990), 121.

[23] For instance, this kind of argumentation is typical of Pufendorf in his discussion on family relations and marriage. Because family life requires so much effort, to encourage humans to have children God "implanted in the sexes a mutual propensity and strong impulses toward one another". Furthermore, to help otherwise self-interested parents to fulfill their duties as parents God implanted in them "a most ardent affection for their offspring, so that they would willingly and gladly undertake" the duties of parents necessary for the survival of the human race. *De jure* 6.2.1. Translation in Pufendorf, *The Political Writings*, 198.

[24] *De jure* 2.5.1. Translation in Pufendorf, *Of the Law of Nature and Nations*, 265.

[25] *De jure* 8.6.8.

has not only instilled in the minds of men a bitter sense of injuries," so that people could avoid injuries but "also given his body for its protection such agility and strength of hands that he may not be forced to bear them in patience."[26] To kill other persons in self-defense is permissible only if the danger cannot be removed by any other means. Pufendorf points out, however, that this rule should not be interpreted too strictly, because the immediate risk of death is linked to "the excited state of one's mind" that does not "permit a person to survey all the ways of escape with the same care as is his who is free from danger and enjoys a calm mind".[27] In Pufendorf's view, then, the right of self-defense "is moderated by the instinct for one's safety, and the necessity of preserving one's own possessions".[28]

Moreover, Pufendorf believes that, in some instances, it may be acceptable to sacrifice one's own life to protect the security of another person, "especially for an innocent and worthy man", or to give oneself as a hostage in order to save others. Nonetheless, he argues that natural law does not command us to value another's life above ours. This "is clearly to be deduced from the common inclination of men" and the observation that "every man is dearest to himself".[29] In this passage, Pufendorf deduces an explanation why natural law does not command individuals to sacrifice their own lives for the security of other people from the inclination that is common to all humans. In addition to the natural inclination of self-preservation, which humans share with other animals, he seems to refer to the idea that self-loving men cannot but naturally value their own life higher than the lives of others.

The above-mentioned passages appear to contradict the basic premise of Pufendorf's moral theory, which that does not allow us to deduce natural rights from the morally indifferent features that humans have as physical entities. This apparent inconsistency raises the question of Pufendorf's position. According to Karl Olivecrona's interpretation, the natural inclination that provides individuals with the initiative to react against violations (*iniuria*) towards their body and life signifies that, in Pufendorf's thinking, the natural rights to body and life constitute the realm of an individual's own (*suum*) independently of the obligations imposed by natural law.[30] Olivecrona's reading is problematic, however, as it explicitly diverges from Pufendorf's presupposition that natural rights cannot be founded on natural instincts.

One obvious way of trying to solve this problem would be to concede that,

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[26] *De jure* 8.6.2. Translation in Pufendorf, *Of the Law of Nature and Nations*, 1293. See also *OHC* 1.5.12

[27] *De jure* 2.5.9. Translation in Pufendorf, *Of the Law of Nature and Nations*, 277.

[28] *De jure* 2.5.16. Translation in Pufendorf, *De jure naturae et gentium*, 289.

[29] *De jure* 2.4.18. Translation in Pufendorf, *Of the Law of Nature and Nations*, 259. Translation modified. Oldfathers translate the term *communis inclinatio* as "common feeling". I have translated it as "common inclination".

[30] Karl Olivecrona and Thomas Mautner, "The Two Levels of Natural Law Thinking", *Jurisprudence* 1 (2010): 222-223.

notwithstanding his antiteleological leanings, Pufendorf conceives the instinct to self-preservation as a natural feature that leads to the actualization of a human being's *telos* to preserve oneself. This could possibly clarify his occasional habit of associating natural rights with natural inclinations. However, self-love and the inclination of self-preservation are not merely something that God has implanted in humans in order to prohibit them from committing suicide, but also a potential source of social conflict and the central cause of quarrel in the pre-civil state of nature. Nature has implanted "into each person such a tender love of his own self and things" that people naturally react by "all possible means" towards individuals intending to harm them.[31] What is more, when defending one's safety, a human being often wards off the attacker "so vigorously that hatred and desire for revenge usually last long after he has beaten off the attack."[32] Because natural inclinations, such as self-love and the instinct of self-preservation, frequently tend to disrupt rather than increase sociability, they cannot be forthrightly understood as natural teleological features of human nature.

I think that the remarks concerning natural inclinations present an inherent ambiguity in Pufendorf's rights theory, which cannot be solved by considering solely the moral theoretical foundations of his rights theory. This should leave us looking for whether there are other ways to explain how natural inclinations and the normative theory of natural rights are intermingled. While Pufendorf denies that the intrinsic features of human nature could be the normative source of natural rights, when specifying the content and limits of natural rights, that is, a moral power to act that natural law grants or leaves unaffected, he takes into consideration the physical and psychological features of human nature as well. It is relevant for our purposes that when coerced by the inclination to self-preservation, an agent's freedom to act is left unaffected by the obligations of natural law. I consider this is what Pufendorf believes when he appears to make normative claims grounded on the inclination of self-preservation.

Like many other right theorists before him, Pufendorf notes that the term right (*ius*) is ambiguous and carries several meanings. While the terms right and law often represent the same thing, we should not use right as a synonym for law, when it denotes a moral power (*potestas*) to do something granted or left unaffected by the laws". Accordingly, "man has moral power (*potestas*) to do whatever lies within his own natural capacity, unless law prohibits it". In this usage, the term "right" refers to a liberty "while 'law' denotes a bond (*vinculum*) by which our natural liberty is constrained".[33] It is important to note that right as the *potestas* of an individual signifies the legitimate

[31] *De jure* 3.3.1. Translation in Pufendorf, *The Political Writings*, 158.

[32] *De officio* 1.3.2. Translation in Pufendorf, *On The Duty of Man and Citizen*, 33.

[33] *De jure* 1.6.3. Translation in Pufendorf, *The Political Writings*, 120. Translation modified. In this context, Seidler translates the term *potestas* as "authority". I have translated *potestas* consistently as "moral power", that is, normative power over one's actions.

power of acting commanded by the laws as well as the power of acting when the laws are silent. In Pufendorf's thinking, a power to act when the laws are silent is not legitimate due to the notion of permissive natural law but because in these situations acts are indifferent in relation to law.[34] In other words, where the law ends, liberty begins.

Since psychological inclinations or instincts do not have any normative status in Pufendorf's natural law theory, he cannot formulate the right of self-preservation as being founded on the instinct of self-preservation. Nevertheless, his moral psychology leaves room for the notion that, in some instances, an individual's right or moral power to act remains free from the obligation of laws. According to Pufendorf, "it must be noted that the will is sometimes under such immense pressure, when it is threatened by grievous evils judged to exceed the ordinary strength of the human mind, that it consents to undertake things it absolutely avoids when not so necessitated".[35] Citing Aristotle's *Nicomachean Ethics*, Pufendorf defines these actions as mixed (*actiones mixtae*) and explains that they are partially voluntary insofar as "their principle lies in an agent aware of the action's details, and also insofar as the will, for now and by necessity, turns towards them as a lesser or a partial evil, since it would otherwise have to undergo a greater or an entire evil."[36] At the same time, they are partially involuntary "because the will is driven to them against its own inclination and would never undertake them if it could escape the graver evil in some other way". Therefore, these actions partly lack the "moral effects," which result from "purely spontaneous actions".[37] In other words, actions are partly involuntary because they are the products of extraordinary circumstances, yet they are also voluntary because the agent chooses these actions under the given circumstances.

Pufendorf's usage of the concept of mixed actions allows the following interpretation. When facing an immediate risk of death, the coercive effect of the inclination of self-preservation compels people to act partly voluntarily. In these situations, laws do not impose obligations. Throughout *De jure*, Pufendorf continually stresses that all normal adults are able to control their habits and passions and, hence, are morally accountable for their actions. However,

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[34] Brian Tierney, *Liberty & Law: The Idea of Permissive Natural Law 1100-1800.* (Washington, D.C.: 2014), 281.

[35] *De jure* 1.4.9. Translation in Pufendorf, *The Political Writings*, 115. Hobbes seems to have in his mind the same kind of idea when he explains in *De cive* that "there is in every man a kind of supreme stage of fearfulness, by which he sees the harm threatening him as the worst possible, and by natural necessity does his best to avoid it; and is understood not to be able to do otherwise." Thomas Hobbes, *On the Citizen*, eds. and trans. Richard Tuck and Michael Silverthorne (Cambridge, Eng.: 1997), 39.

[36] *De jure* 1.4.9. *Translation in Pufendorf, The Political Writings,* 115-116. See Aristotle, *Nicomachean Ethics*, trans. and ed. Roger Crisp. (Cambridge, Eng.: 2000), 37-40. For an analysis of Aristotle's treatment of mixed actions, see Karen M. Nielsen, "Dirtying Aristotle's Hands? Aristotle's Analysis of 'Mixed Acts' in the *Nicomachean Ethics* III,1," *Phronesis* 52 (2007): 270-300.

[37] *De jure* 1.4.9. Translation in Pufendorf, *The Political Writings*, 116.

there is a remarkable difference between the effects of the inclination of self-preservation and the strain that habits and other passions place on the freedom of our actions. While we are able to resist the external effects of habits and other passions, an instant danger of death overpowers the strength of the human mind and takes precedence over the freedom of the will. Under the stimulus of the inclination of self-preservation we cannot always be considered completely voluntary moral agents and, as a result, not fully accountable for our actions. This is what Pufendorf has in mind when he explains as follows: "when an agent's power to act are so tied by nature to a uniform mode of acting that they cannot by internal motion digress into another mode, they produce not a moral but a physical action, which is said to arise from necessity rather than from obligation".[38]

Pufendorf's remarks concerning the natural inclination of self-preservation should not be directly understood in a normative fashion. In addition to the psychological capacities of human nature, he is attentive to the contextually fluctuating conditions of social life when explaining the practical content of rights to life and one's body. For Pufendorf, then, natural rights cannot offer an absolute moral ground on which one could act autonomously, without regard to historically contingent authority relations and social conventions. Contextual considerations become particularly urgent when he explicates the limits of the rights to life and one's body in civil societies. The founding of the state is the most effective means to accomplish natural law's imperative to self-preservation.[39] Since the institutions of the state are a necessary vehicle to promote the end of natural law, namely peaceable sociability, individuals are obligated by the law of nature to perform their political duties.[40]

The duty of self-preservation is ultimately a duty imposed by God. Pufendorf thus denies that individuals or states have an "absolute power" over human life and one's body. Nonetheless, individuals and states have a limited power over human life and the body.[41] After the establishment of states, the necessary means to promote sociability, the sovereign has a right to citizens' lives and bodies which may override individuals' natural rights to these things. When establishing the state, citizens surrender their natural liberty to decide by their own judgment on

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[38] *De jure* 1.6.8. Translation in Pufendorf, *The Political Writings*, 122.

[39] Michael J. Seidler, "The Politics of Self-Preservation: Toleration and Identity in Pufendorf and Locke," in *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment*, eds. Tim J. Hochstrasser and Peter Schröder (Dordrecht: 2003), 229.

[40] *De officio* 2.6.14.

[41] *De jure* 2.4.19. For instance, Pufendorf denies the notion of Aristotelian natural slavery and states that "humanity favours the liberty of the issues of slaves," while maintaining that "not only labour but also the body of a slave is understood to belong to his master." *De jure* 6.3.9. Translation in Pufendorf, *Of the Law of Nature and Nations*, 942. Like Hobbes, Pufendorf suggests that individuals are obligated to accept the contracts entered into by their ancestors by arguing that since the children of slaves would have never been born without the master's consent and owe their nourishment to their master, they are supposed to have given a tacit consent to slavery.

matters of life and death to the sovereign who now has moral power (*potestas*) "over the body and life as well as the goods of the citizens on the account their crimes".[42] By emphasizing the artificial character of civil law and the sovereign's arbitrary right to carry out punishment, Pufendorf follows Hobbes in rejecting the idea of the functional order of nature that restricts the liberty of the sovereign to inflict punishment.[43]

It is relevant for our purposes that, unlike the right to self-defence among citizens, the natural inclination to self-preservation does not control the limits of the right of violent self-defence against the sovereign. When the sovereign unjustly threatens the body, the citizen is released from his obligation to the sovereign. Nevertheless, when the sovereign's vicious persecution on unjust grounds jeopardizes the citizen's life, the persecuted citizen has no right to repel force with force. According to Pufendorf, "even when a prince threatens the most dreadful injury with a hostile intent, it is preferable to emigrate, to look out for oneself by fleeing, or to place oneself under the protection of another state". When this is impossible, "one ought to die rather than to kill, not so much because of the person of the prince himself as because of the whole commonwealth, which tends nearly always to be involved in grave disorders on such an occasion".[44] It is worth noting that Pufendorf seems hesitant to claim explicitly that violent self-defense against the magistrate is unconditionally wrong. Still, he notes that "even if it were entirely conceded that it is sometimes not wrong for a citizen to defend his own welfare against the most dreadful injuries of a superior by force", other citizens are not allowed "to put aside their obedience or to protect the innocent person by force".[45]

Pufendorf does not offer an explanation on how an average moral agent pushed by the inclination of self-preservation is able to rationally choose death for the sake of the common good of society. It is more important for him to emphasize that violent self-defense against the sovereign undermines the sovereign's authority and possibly leads to civil war. When confronted by a choice between the need to preserve one's life and the risk of a destructive social conflict, an individual is obligated by natural law to sacrifice his life. The duty to cultivate sociability, which is required for the survival of the political community as a whole, supersedes an individual's natural

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[42] *De jure* 8.3.1. Translation in Pufendorf*, The Political Writings*, 249. See also *De jure* 7.1.4.

[43] For Pufendorf's theory of punishment, see Dieter Hüning, "Souveränität und Strafgewalt. Die Begründung des *jus puniendi* bei Samuel Pufendorf," in *Naturrecht und Staatstheorie bei Samuel Pufendorf*, ed. Dieter Hüning (Baden-Baden: 2009), 71-93.

[44] *De jure* 7.8.5. Translation in Pufendorf, *The Political Writings*, 238.

[45] *De jure* 7.8.5. Translation in Pufendorf, *The Political Writings*, 239. In some circumstances, Pufendorf allows the possibility of a collectively led violent resistance against the sovereign. For an analysis of Pufendorf's theory of resistance rights, see Michael J. Seidler, "Turkish Judgement and the English Revolution: Pufendorf on the Right of Resistance," in *Samuel Pufendorf und die europäische Frühaufklärung: Werk, und Einfluss eines deutschen Bürgers der Gelehrtenrepublik nach 300 Jahren (1694–1994),* eds. Fiammetta Palladini and Gerhard Hartung (Berlin: 1996), 98-104.

right to defend his or her body and life. Pufendorf's focus here is on the maintenance of sociability without any appeal to the more foundational concept of natural rights. Whereas Hobbes always regards acting contrary to one's self-preservation as irrational, Pufendorf subordinates the right of self-preservation to the duty to cultivate sociability.

Principle of Necessity

As I have been pointing out, Pufendorf encounters difficulties when trying to combine the inclination of self-preservation that drags our will with the norms of sociability that ought to bind our actions. The situation of extreme necessity in particular presents an acute problem for him. The principle of extreme necessity was one of the best-known legal principles that early modern natural law theorists inherited from their late-medieval predecessors.[46] Pufendorf seems to be aware of the popularity of this principle in his own time when noting that "the power of necessity is a phrase upon the lips of all men, because it lacks the restraint of the law, and is understood to form an exception in all the rules of man".[47] This formulation implies that the main stimulus leading Pufendorf to discuss extreme necessity is to carefully examine the nature and limits of such necessity in order to prohibit groundless claims, not to enthusiastically defend one's universal right to do forbidden things at the time of necessity.

What is of particular interest is that Pufendorf explicitly links together the instinct of self-preservation and the right of necessity in a way that has direct implications for the individual rights to life and body. In striking contrast to his moral theory, it looks as if he deduces the principle of necessity directly from the instinct of self-preservation:

> Here it appears that whatever right or privilege or indulgence is allowed, necessity proceeds only from the fact that a man cannot avoid straining himself for his preservation, and therefore it is not easy to presume that such an obligation rests upon him as ought to outweigh the zeal for his own safety.[48]

In this passage, Pufendorf does not directly claim that people cannot sacrifice their life when

[46] See articles by Jonathan Robinson and John Salter in this volume.

[47] *De jure* 2.6.1. Translation in Pufendorf, *De jure naturae et gentium*, 295.

[48] *De jure* 2.6.1. "Ubi adparet, quicquid est illud sive juris, sive favoris, aut veniae, quod necessitati tribuitur, unice inde promanare, quod non possit non homo omni studio ad se conservandum conniti; eoque non facile praesumatur, talem ipsi obligationem impositam, quae ardori propriae salutis conservandae praeponderare debeat." Translation in Pufendorf, *De jure naturae et gentium*, 296. Translation modified. Oldfathers translate the first sentence as "… necessity proceeds only from the fact that a man cannot avoid straining his every nerve for his own self-preservation".

obligated to do so. Nevertheless, it is very difficult to believe that people could overcome their inclination of self-preservation in the state of necessity. Because he associates the principle of extreme necessity with the instinct of self-preservation, it may be asked: Is the above-cited formulation consistent with the distinction between physical and moral entities? There is no consensus among modern commentators on the foundations of the right of necessity in Pufendorf's theory.[49] In my view, Pufendorf's theory of necessity is not necessarily in stark contrast to his general theory of natural rights. I maintain that the contradictory elements within Pufendorf's theory of necessity and the theory of natural rights can be best understood in the light of his non-absolutist attitude towards the commands of natural law that at all times endeavors to take into account human psychology as well as contextual social arrangements and conventions.

The key to understanding Pufendorf's position is the premise that in the unusual circumstances of extreme necessity people cannot help themselves avoiding some evil that threatens their self-preservation. While acting instinctively in the circumstances of extreme necessity in order to avoid greater evils, our actions are not under the guidance of free will. Necessity, therefore (at least partly), overrides freedom of will. The actions performed "under necessity or with a mind confused at the prospect of some impeding danger" should be "excused" rather than "approved". Thus, necessity constitutes an exception rather than a general rule of action.[50]

While Pufendorf establishes a strong connection between the principle of necessity and the inclination to self-preservation that impels the will, he does not determine the concrete cases of necessity by deducing the right of necessity directly from the instinct of self-preservation. When specifying the situations which allow exceptions to natural law, he takes into consideration the contextual aspects as well. Like John Locke later, Pufendorf thinks that we are God's property. People do not belong to themselves but to God, who is the absolute master (*absolutus dominus*) of their life and body and has only lent them to a certain period of time. However, even though the human being "in general has no right over his own body, to destroy it at his pleasure, or to deform, or to mutilate it", in order to save his life, "he will yet be allowed to cut off some part that is infected with an incurable disease, or that has been rendered useless by a wound".[51] Pufendorf also

[49] For instance, according to Thomas Behme, the principle of necessity presents "a gap" in Pufendorf's theory, because, contrary to rest of his rights theory, Pufendorf deduces it from the instinct of self-preservation. Behme, *Samuel von Pufendorf. Naturrecht und Staat*, 84-85. Kari Saastamoinen disagrees with Behme and suggests that "the right of necessity does not follow from the inclination to self-preservation, but from God's will," and "that our behaviour in such situations should perhaps be seen as based on special favour granted by the lawgiver, rather than universal right." Saastamoinen, "Liberty and Natural Rights," 238.

[50] *De jure* 2.3.11. Translation in Pufendorf, *De jure naturae et gentium*, 200.

[51] *De jure* 2.6.3. Translation in Pufendorf, *De jure naturae et gentium*, 298.

specifies some other situations that allow exceptions to natural law. For instance, if an individual after a shipwreck has managed to seize a plank, which is not large enough for both persons, one may use "every kind of violence" to keep the other off the plank.[52]

The limits of necessity in relation to natural law commands must always be determined through thorough circumstantial reflection. In turn, Pufendorf notes that the exceptions to civil laws are more easily allowable than exceptions to natural laws. Like numerous authors before him, he admits that the necessity to preserve our lives overrules the property rights established by civil law.[53] The justification of the right to acquire the property of others is an interesting problem for Pufendorf, since elsewhere in his works he articulates a fierce justification for private property. The division of property was an essential precondition for tranquil social order, because property rights made it possible for men to avoid quarrelling over material goods. Although God does not directly command men to establish separate dominions, once the division of property is established by the human will, Pufendorf states that "the natural law itself declares it a crime to take what belongs to another without the owner's consent".[54] It is little wonder that, according to Craig Carr, Pufendorf's apology for private property relations seems "horribly conservative".[55] In turn, James Tully argues that Pufendorf and John Locke have "two radically dissimilar views of the relation of man to the world". Tully maintains that "for Pufendorf, property expresses man's privilege to dominate the world; for Locke it expresses man's privilege to use the world which is not essentially his own".[56]

These suggestions give a partly misleading interpretation of Pufendorf's theory of property. It should be noted that his analysis of private property is woven into the larger fabric of his moral preoccupation with sociability. In Pufendorf's view, God ultimately has "complete dominion over all things".[57] Individuals' rights to property should not be understood as unrestricted claims to satisfaction. People should use property not only for their individual advantage, but for the common good. The division of property was not established with the goal of sharing of property.[58] Instead, a property owner ought to share it with others and has an imperfect duty to help others in need. Non-compulsory imperfect duties have the essential role of

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[52] *De jure* 2.6.4. Translation in Pufendorf, *De jure naturae et gentium*, 300.

[53] For the comparison between Grotius's and Pufendorf's theory of necessity from the perspective of property rights, see John Salter, "Grotius and Pufendorf on the Right of Necessity," *History of Political Thought* 26 (2005): 293–294.

[54] *De jure* 2.3.24. Translation in Pufendorf, *The Political Writings*, 156-157.

[55] Craig Carr, "Editor's Introduction," in *The Political Writings of Samuel Pufendorf*, trans. Michael J. Seidler and ed. Craig Craig (New York: 1995), 21.

[56] James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge, Eng.: 1980), 75.

[57] *De jure* 4.3.2. Translation in Pufendorf, *Of the Law of Nature and Nations*, 524.

[58] *De jure* 2.6.5. Translation in Pufendorf, *Of the Law of Nature and Nations*, 301.

improving sociability. We are obligated by the law of humanity "often to allow another our goods and use of them".[59]

People are not allowed to use violence in order to make others perform their imperfect duties (such as charity) unless a necessity requires it. Although we have only an imperfect right to receive charity from others, in circumstances of extreme need, Pufendorf thinks, we may use a surplus of property against the owner's will, "whether we seize it by stealth or by open violence (*vel clam vel aperta vis*)".[60] Pufendorf asks rhetorically: "Can any human institution have such a power that, if another neglects to do his duty towards me, I must perish rather than depart from the customary and usual manner of procedure?" He answers:

> I should not feel, therefore, that a man has made himself guilty of the crime of theft if when he has, through no fault of his own, fallen into extreme want of food necessary to maintain life, or of clothing to protect his body from the bite of cold, and has been unable either by entreaties, or money, or the offer of his services, to get others in easy circumstances, and even in luxury, to give them to him of their own accord, he should make away with them by violence or by stealth and especially so if he intends to make good their value whenever a kindlier fortune may smile upon him.[61]

The important point to be extracted from this argument is that in a case of extreme necessity, people may seize other people's property by violence or by stealth. Likewise, in 3.3.5 of *De jure*, Pufendorf refers to the idea that, in a state of extreme necessity, violence may be allowable by clarifying that permission to use the property of others must first be sought in a peaceable manner, but "this use under the stress of necessity, may even be claimed by force, since, indeed, its denial is caused by groundless timidity of the mind".[62] It should be said that the use of force can only be exercised within certain limits: The rights of necessity may be claimed by force only when other means have been exhausted, and restitution needs to be made whenever possible.

The idea that people may steal or violently seize things owned by others seems to be contradictory to Pufendorf's central commitment to sociability and political stability. Nevertheless, the notion that people may violently seize the property of others is in accordance with his definition of imperfect rights. If a right holder is unjustly prohibited from exercising his imperfect rights,

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[59] *De jure* 4.8.1. Translation in Pufendorf, *Of the Law of Nature and* Nations, 408.
[60] *De jure* 2.6.5. Translation in Pufendorf, *Of the Law of Nature and Nations*, 301.
[61] *De jure* 2.6.5. "Igitur non judicaverim furti crimine se illum adstringere, si quis praeter propriam culpam in extrema inopia rerum ad victum necessariarum, aut quibus corpus contra saevitiam frigoris munitur versans, postquam ab aliis locupletibus atque abundantibus neque precibus neque pretio, nequa oblata sua opera, illas ut ultro sibi concederent, impetrare potuit, vi, aut clanculum eas subducat; praesertim ubi intentionem habeat, earum aestimationem praestandi, quando copiosior fortuna arriserit." Translation in Pufendorf, *Of the Law of Nature and Nations*, 302.
[62] *De jure* 3.3.5. Translation in Pufendorf, *Of the Law of Nature and Nations*, 354.

Pufendorf notes, he has no right "to legal action or war, unless by chance necessity supplies what is lacking in effectiveness".[63] Pufendorf, like Hugo Grotius, distinguishes the direct precepts of natural law from the precepts that people have established in order to promote sociability, which has only a reductive relation to natural law.[64] While natural law protects the rights of property owners, property rights are only reductively related to the commands of natural law. This is why Pufendorf is able to claim that certain natural laws, "which cover the mutual duties of men", always presuppose some "human deed or institution" and form an exception in the case of extreme necessity.[65]

In a state of extreme necessity, the inclination to self-preservation coerces our will, leaving our actions as mixed rather than completely voluntary. We cannot be regarded as entirely morally accountable agents and, therefore, our actions are left unaffected by the laws. Pufendorf does not derive the right of individuals to preserve their body and life from the duty to self-preservation imposed by natural law or from the inalienable right to self-ownership. Instead, an individual's right to preserve his or her life, even when obtained by violence, involves the natural instinct to self-preservation (which is compulsive in its nature), coercing the will to choose some otherwise forbidden action in a manner where the moral effects of action cannot be imputed to the agent.

Pufendorf is attentive to the fact that the sovereign can never remove the inclination of self-preservation from human nature. He therefore argues that the legislators have taken into account the effects of the inclination of self-preservation when imposing civil laws. While civil laws are imposed by the arbitrary will of the sovereign, the legislators "are supposed always to have had before their eyes the weakness of human nature, and how man cannot but help avoiding and repelling whatever tends to his destruction".[66] The awareness of the coercive effects of the inclination of self-preservation influenced how Pufendorf reflected the duties of the sovereign to legislate suitable laws. Civil laws "proceeds entirely from the pleasure of a legislator, although it should not lack reason and usefulness, at least for the particular society of men for which it is passed".[67] The purpose of civil laws should be the promotion of "men's safety or convenience". It is therefore "presumed from the benevolent mind of the legislator and from the consideration of human nature, that a case of necessity is not included under the law which has been conceived with general scope". Pufendorf goes on to state that "most laws" are therefore understood as making

[63] *De jure* 1.1.19. Translation in Pufendorf, *The Political Writings*, 106.
[64] *De jure* 2.3.22. See Michael J. Seidler, "Pufendorf's Moral and Political Philosophy," in *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), ed. Edward N. Zalta <https://plato.stanford.edu/archives/spr2018/entries/pufendorf-moral/>.
[65] *De jure* 2.6.2. Translation in Pufendorf, *Of the Law of Nature and Nations*, 297.
[66] *De jure* 2.6.2. Translation in Pufendorf, *Of the Law of Nature and Nations*, 296.
[67] *De jure* 1.6.18. Translation in Pufendorf, *Of the Law of Nature and Nations*, 112.

"an exception in the case of necessity, or to lay no obligation, when such an obligation will be attended by some evil, destructive of human nature, or too great for the common constancy of mankind".[68] Thus, in the instances of necessity, the law of nature does not impose obligations and neither should civil laws.

Conclusion

To summarize, we are used to perceiving Pufendorf's rights theory as structured in such a way that natural rights are ultimately grounded on the foundational principle of sociability. I think that there is no denying that Pufendorf provides an argument in which normative natural rights are grounded in the duties imposed by natural law rather than the facts about our nature. Because corrupted human inclinations cannot serve as a self-sufficiently moral compass, the content of the natural law cannot be ultimately derived from the emotional effects of the inclination of self-preservation. In this sense, Pufendorf's theory of rights is designed to conceptually detach natural rights from the corresponding natural inclinations, such as the right to self-preservation from the inclination to self-preservation.

However, the strict assumption that the morally non-foundational natural inclinations cannot have any place in Pufendorf's theory of natural rights seems to lead us to interpret some of Pufendorf's remarks as follows: either he is not consistent in what he says or he obviously cannot really mean what he says. I have argued that whereas Pufendorf steadily maintains that natural inclinations and instincts are not the source of normativity *per se*, he nowhere denies that how human beings function as physical entities affects the scope and limits of the natural rights to life and body. By drawing attention to Pufendorf's remarks on the coercive effects of the inclination of self-preservation, I have shown that he remains sensitive to human psychology when describing and redefining the constraints of natural rights in different social settings. We have to approach his theory from a perspective that allows us to take seriously the different and potentially conflicting aspects of his thinking: (1) the natural rights to body and life founded by the obligations imposed by natural law, (2) an effort to understand the psychological and physical capacities of human nature, and (3) the consideration of ever-changing social situations in which humans practically make choices concerning life and death.

Although there are no normative connections between natural laws and the facts of human nature, for Pufendorf, the actual content of moral norms is not detached from the realistic

[68] *De jure* 2.6.2. Translation in Pufendorf, *Of the Law of Nature and Nations*, 296.

analysis of natural necessities of human nature. It should be stressed, however, that Pufendorf does not want to commit himself to the idea that coercive effects of the inclination of self-preservation grant citizens a universal right to disobey civil laws. For instance, necessity may justify violent actions in the case of the mutual duties of men, such as appropriation of the property of others, because the needy are entitled to receive help by an imperfect right. But necessity cannot justify an individual's violent self-defence against the sovereign even when the sovereign unjustly persecutes him. Natural rights do not constitute a sphere of personal autonomy independent of the contextually specific demands of sociability. Rather than concentrating on rights-bearing individuals, his focus is on the more or less variable conditions of sociability. Given his fundamental commitment to the maintenance of political stability, Pufendorf chooses to behave as a political counselor and advises that the sovereign ought to take the natural inclination of self-preservation prudently into account when legislating civil laws.

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